

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL A BURNHART,

Plaintiff,

v.

DET. JIM MARAI *et al.*,

Defendants.

Case No. C06-5643 FDB

ORDER ADOPTING
REPORT AND
RECOMMENDATION

The Magistrate Judge recommends that this civil rights complaint be dismissed prior to service for failure to state a claim. As detailed by the Magistrate Judge, Plaintiff's claim for relief necessarily implies the invalidity of a criminal judgment and must be brought as a petition for a writ of habeas corpus, and not as a 42 U.S.C. § 1983 action. See, Butterfield v. Bail, 120 F.3d 1023 (9th Cir. 1997).

Petitioner has not filed a formal objection to the Report and Recommendation. Instead, Petitioner has filed a "Motion to Dismiss with ability to pursue at a later date." Because this matter will be dismissed without prejudice, Plaintiff's motion is unnecessary and moot.


The Court, having reviewed, the Report and Recommendation of Magistrate Judge J. Kelley Arnold, and the remaining record, does hereby find and ORDER:

- (1) The Court adopts the Report and Recommendation.
- (2) The Complaint [Dkt #5] is **DISMISSED WITHOUT PREJUDICE** for failure to state a claim. This action must proceed in habeas corpus as it calls into question a criminal conviction.

1 (3) Plaintiff's Motion to dismiss [Dkt. #7] is denied as **MOOT**.

2 (4) The Clerk is directed to send copies of this Order to plaintiff, and to the Hon. J.
3 Kelley Arnold.

4 DATED this 3rd day of January, 2007.

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9 FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE